

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

DAVID BERGER and AMBER
BERGER, individually and as Personal
Representatives of the Estate; THE
ESTATE OF WILLIAM SAGE
BERGER,

Plaintiffs,

v.

SPOKANE COUNTY, political
subdivision of the State of Washington;
OZZIE KNEZOVICH, individually
and in his capacity as Sheriff of
Spokane; SHAWN AUDIE and
STEVE PAYNTER, individually and
in their capacity as a Spokane County
Sheriff; JOHN DOES 1-10,

Defendants.

NO: 2:15-CV-140-RMP

ORDER GRANTING IN PART AND
DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY
JUDGMENT

BEFORE THE COURT is a motion by all Defendants for summary
judgment, **ECF No. 24**, on Plaintiffs' claims brought under 42 U.S.C. § 1983 and
Washington state negligence law. Having considered the parties' arguments, both

ORDER GRANTING IN PART AND DENYING IN PART DEFENDANTS'
MOTION FOR SUMMARY JUDGMENT ~ 1

1 in briefing¹ and as presented at the oral argument hearing on January 10, 2017, and
2 having reviewed the remaining record and the relevant law, the Court is fully
3 informed.

4 **FACTUAL BACKGROUND**

5 This case concerns an individual, William S. Berger (“Will”),² who became
6 brain-dead during the course of his arrest by Spokane County Deputy Sheriffs on
7 June 6, 2013. Will allegedly was in the midst of a mental health crisis and was
8 actively resisting the deputies’ attempts to restrain him up until losing
9 consciousness and/or suffocating. Spokane County law enforcement responded to
10 a call from a private gym that Will had caused a disturbance within the gym and
11 remained outside. Deputies Shaun Audie and Steve Paynter employed tasers and,
12 allegedly, a vascular neck restraint technique in the course of restraining Will.
13 Will did not regain consciousness and, the next day, was removed from life
14 support.

17 ¹ Plaintiffs provided three videos as part of their exhibits. However, the Court
18 could access only the audio and not the video Exhibit A of ECF No. 43.

19 ² Without intending disrespect but to avoid confusion, members of the Berger
20 family are referred to by their first names.
21

1 The interaction generating the present lawsuit apparently lasted only
2 approximately six minutes. The context preceding and subsequent to Will's
3 encounter with Audie and Paynter and the moment-to-moment details of the
4 encounter are as follows.

5 Will was 34 years old, 6 feet 1 and a half inches tall, and weighed
6 approximately 170 pounds at the time of the events in question. He began to
7 exhibit mental health issues when he was in high school. Will's mental illness
8 manifested as manic episodes at which point Will required medical intervention,
9 including hospitalization and medication, to return to stability. Will's family
10 recalled that, prior to June 2013, Will had last exhibited symptoms of a manic
11 episode while working abroad in South Korea in approximately 2010.

12 On the evening of June 4, 2013, Will had been removed from a jiu-jitsu
13 martial arts facility in north Spokane after he began acting erratically, throwing a
14 trash can around, rolling around in trash, removing his uniform, and sweating and
15 breathing heavily. As Will appeared to grow more agitated and aggressive, he
16 retreated to a bathroom where he stripped naked, claimed to see God and other
17 figures, and punched a hole in the wall. Four to five customers helped the gym
18 owner remove Will from the bathroom and restrain him until law enforcement
19 arrived. The responding officer handcuffed Will, rolled him onto his side, and
20 summoned medics "since it was a medical issue." ECF No. 42-4 at 3. The jiu-jitsu
21 gym's owner recalled that one of the officers observed that Will's behavior

1 signaled “excited delirium.” ECF No. 42-5 at 3. Medics transported Will,
2 strapped to a gurney, to a hospital for treatment. The gym owner informed law
3 enforcement that Will was no longer welcome at the gym. Law enforcement
4 determined that, although Will was trying to attack people and damage property,
5 he did not hit anyone or cause any actual property damage and had not committed
6 a crime.

7 Upon hearing of Will’s removal from the jiu-jitsu gym and hospitalization,
8 Will’s father, William Berger, Sr., (“William, Sr.”), traveled to Spokane from
9 across the state. On the evening of June 6, 2013, William, Sr. dropped Will off at a
10 gym on Spokane’s South Hill, OZ Fitness, with plans to return to pick Will up after
11 his workout. William, Sr. recalled that Will seemed to be feeling better after
12 leaving the hospital.

13 While in the gym, Will became agitated over the course of his work out and
14 drew attention from others in the gym including the Oz Fitness staff by grunting
15 loudly, pacing around, chanting repetitively and semi-coherently, stomping his
16 feet, removing his shirt, and eventually punching the paper towel machine off of
17 the wall. Between 6:56 and 7:16 p.m., two individuals from the gym called 911.
18 Gym employee Levi Sullivan reported, as recorded in the dispatch log: “High male
19 yelling at people. Broke items. No weapons. Has grabbed people. Medics not
20 needed. Male now in no shirt talking about the end of the world. Male towards the
21 entrance, has medical bracelet. Subject is now outside in the parking lot.” ECF No.

1 26-1 at 119 (abbreviations and missing punctuation in dispatch log replaced for
2 clarity). A gym customer named Joe Bornstein called in at approximately 7:16
3 p.m., and his statements were recorded in the dispatch log as follows: “Subject has
4 been pushing people and knocked stuff off the walls inside, is outside now, trying
5 to get back in. . . . The male is currently outside in the front of the building. Has
6 some kind of a medical bracelet on. Jumping up and down and is acting like he
7 wants to fight people.” ECF No. 26-1 at 119 (abbreviations and missing
8 punctuation in dispatch log replaced for clarity).

9 The general manager of the gym, along with at least one customer, escorted
10 Will from the gym. During the time before law enforcement arrived, Will
11 remained in or around the gym’s parking lot, in near constant movement. At least
12 three of the people present feared that Will was charging at them when he ran in
13 their direction, and Will repeatedly grabbed onto the collar of the shirt worn by the
14 customer who had taken a lead in escorting him out.

15 Deputy Paynter was the first to respond to the 911 calls from the gym, at
16 approximately 7:21 p.m., while there was still daylight although dusk was
17 approaching. Paynter remembers the call he was responding to as informing him
18 of “a disorderly subject at OZ Fitness that was—I think they said that he was
19 attacking people and destroying things inside.” ECF No. 26-1 at 55. The deputy
20 initially pulled his marked patrol car up alongside the gym parking lot. Gym
21 employees and patrons in the parking lot identified Will, who was near the street

1 corner at the time, as the person whom the calls concerned. Will moved toward the
2 front of the patrol vehicle, where he began to bounce on his feet, with his balled
3 fists raised in front of him “like a boxer.” ECF No. 32-2 at 12. The gym’s general
4 manager described Will’s reaction to the arrival of law enforcement as “really,
5 really excited,” “jumping up and down . . . like a gremlin or something.” ECF No.
6 40-6 at 6.

7 Paynter exited his car and stood behind the open driver’s door. Will
8 pounded on the hood of the patrol car, moved around the passenger side, and
9 pounded on the trunk of the car before crossing the street toward a vacant parking
10 lot, outside a vacant shopping center, on the west side of the fairly busy street
11 transecting the vacant lot from the gym and gym parking lot. Paynter recalls that
12 he gave continuous voice commands to Will to stop what he was doing and get on
13 the ground, or he would be tased. Paynter further stated in his deposition that he
14 tased Will before he ran across the street because the deputy felt “trapped” between
15 Will and the open driver-side door. ECF No. 32-2 at 12. However, none of the
16 witnesses who were viewing the events from or near the gym described seeing Will
17 tased before he ran across the street.

18 Paynter immediately got back into his patrol car and made a U-turn into the
19 vacant parking lot across the street to join Will there. Paynter exited the vehicle
20 and again warned Will to stop and informed him that he was there to arrest him.
21 When Will was unresponsive to the deputy’s demand and again crouched into a

1 fighting-like stance, Paynter tased him. The taser did not immobilize Will, who
2 was able to remove the taser probes.

3 Just after Paynter arrived in the vacant lot across from the gym, paramedic
4 Haley Karnitz and her ambulance partner Julie Clayton drove by on their way
5 between posts during their shift. *See* ECF No. 39-1 at 17, 22. Karnitz saw Will
6 “waving his arms around, yelling and screaming; he was jumping up and down,
7 laughing.” ECF No. 39-1 at 22. Karnitz then saw Paynter tase Will, Will fall to
8 his knees, and stand back up and pull the tasers off of his chest as he moved toward
9 Paynter. As a result of what Karnitz saw from the ambulance, she put herself on
10 the call without first being dispatched, out of concern for the safety of both Paynter
11 and Will. Upon informing the American Medical Response (AMR) dispatcher, at
12 7:24 p.m., that she was placing herself on the call, Karnitz reported that the
13 situation she was observing involved an “excited delirium patient.” ECF No. 39-1
14 at 22, 24. The AMR responders stood by at a distance in the parking lot.

15 A second officer, Deputy Audie, was dispatched at the same time as Paynter
16 and arrived after Paynter, Will, and the AMR responders were in the vacant
17 parking lot across the street from the gym. Audie exited his vehicle and went
18 directly to tase Will. Paynter simultaneously tased Will, and Will stiffened and fell
19 to the ground “like a tree,” ECF No. 33-4 at 8, hitting his head. When Will started
20 to prop himself up on his elbow to rise up again, Audie tased him at close range
21

1 into his side. Audie then tossed his taser aside and, along with Paynter went
2 “hands on” by engaging in a struggle to incapacitate Will on the ground.

3 Around the time that the Deputies went hands-on with Will in the vacant lot,
4 William, Sr. pulled up at the gym parking lot to retrieve his son after his workout.
5 Two women pointed him toward the events transpiring across the street, and
6 William, Sr., ran to the vacant parking area in time to see the struggle between the
7 deputies and his son in progress.

8 Just after Will fell to the ground after he was tased, the EMR responders
9 retrieved spinal precaution gear, including a collar, backboard, and gurney from
10 the ambulance and moved toward the deputies who were “on top of” Will by the
11 time the responders reached them. ECF No. 33-4 at 3. The responders offered
12 help, and Deputy Audie requested assistance trapping Will’s arm under his leg.
13 After Karnitz moved Will’s arm, she and Clayton alerted the deputies that Will did
14 not appear to be breathing. Audie yelled at the responders to get out of the way,
15 swearing at them angrily. ECF No. 42-3 at 6. Karnitz recalled that Audie
16 threatened that if she and her partner did not retreat, they would be arrested. ECF
17 No. 42-3 at 6.

18 The record is not clear regarding how Audie and Paynter restrained Will on
19 the ground. It is undisputed that Will was on his stomach, face down. The EMR
20 responders reported seeing Audie laying on Will’s back, with his arm wrapped
21 around Will’s neck in a choke hold. A witness from a nearby apartment balcony

1 recalled seeing a deputy restrain Will with a knee on his head. Audie recalled that
2 he tried to control Will by applying a Lateral Vascular Neck Restraint (“LVNR”)
3 technique, first by wrapping his right arm around Will’s neck and then
4 transitioning to his left arm. Paynter called in a code 99, meaning a request for
5 immediate additional assistance from all available law enforcement personnel,
6 during the 2-3 minutes that Audie was struggling to apply the LVNR hold.

7 Audie maintained that Will somehow grabbed Audie’s taser after Audie had
8 discarded it on the ground and shocked Audie on his forehead, but no other witness
9 or participant of the incident confirms that Will ever held or used the taser.

10 Neither deputy reported Will to be exhibiting signs of excited delirium or any
11 similar mental health crisis. In addition, immediately after the incident, Deputy
12 Audie estimated Will’s weight as 230 pounds and his height as 6 foot 2 or 3 inches
13 tall, ECF No. 32-5 at 4, even though the record reflects that Will was 6 foot 1 and
14 170 pounds, *see* ECF No. 34 at 2.

15 By 7:27 p.m., before the AMR responders had made it back to their
16 ambulance as directed by Audie, and before any other officers arrived, Will had
17 gone limp, and the deputies applied handcuffs. The deputies turned Will over, saw
18 that his face was blue, and summoned the EMR responders back, explaining that
19 Will had no pulse. Audie began chest compressions, while the AMR responders
20 initiated life-saving protocols. Although they restored a pulse, Will was declared
21 brain-dead after being transported to the hospital.

1 Law enforcement conducted an investigation of the incident, beginning
2 before Will was transferred to the ambulance. Spokane County Sheriff's
3 Department Sergeant Richard Gere, the Defensive Tactics Master Instructor for the
4 County, then conducted a use of force review of the deputies' actions. In addition,
5 the Deadly Force Review Board, composed of law enforcement officers and a
6 Spokane County Prosecutor, reviewed the incident.

7 An autopsy was conducted, and the forensic pathologist found that Will died
8 of "hypoxic encephalopathy due to cardiac arrest with resuscitation due to
9 application of restraint measures by law enforcement personnel including neck
10 compression due to mania with physical agitation." ECF No. 41-7 at 2. The
11 pathologist added that "[h]eart abnormalities in the form of tunnel coronary artery
12 and altered cardiac conduction . . . are given consideration as conditions
13 contributing to death." *Id.* He classified the manner of death as a homicide.

14 Spokane County has numerous policies addressing the use of force,
15 including policies specifically addressing the appropriate use of tasers, certification
16 requirements for officers who carry tasers, and the LVNR technique. The County
17 also maintains a policy regarding appropriate treatment of someone suffering from
18 excited delirium. Furthermore, the County provides training to its law enforcement
19 officers on the policies and the techniques that they describe. ECF Nos. 26-1 at
20 35-36, 68-1 at 32, and 94. Indeed, Deputy Audie is a certified instructor in the use
21 of LVNR. *See* ECF No. 69-1 at 3.

1 Plaintiffs filed their complaint on May 28, 2015, alleging that Deputy Audie,
2 Deputy Paynter, Spokane County, and Sheriff Knezovich violated Plaintiffs'
3 constitutional rights under 42 U.S.C. § 1983. In addition, Plaintiffs asserted a state
4 law negligence claim against the individual Defendants and a negligence claim
5 against Spokane County under *respondeat superior* theory. Following extensive
6 discovery between the parties, Defendants moved for summary judgment against
7 Plaintiffs on all claims with respect to all Defendants.

8 SUMMARY JUDGMENT STANDARD

9 Summary judgment exists principally to isolate and dispose of factually
10 unsupported claims. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986).
11 Summary judgment is appropriate when there are no genuine issues of material
12 fact, and the moving party is entitled to judgment as a matter of law. Federal Rule
13 of Civil Procedure 56(a). A "material" fact is one that is relevant to an element of
14 a claim or defense and whose existence might affect the outcome of the suit. *T.W.*
15 *Elec. Serv. v. Pacific Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).
16 The party asserting the existence of a material fact must show "sufficient evidence
17 supporting the claimed factual dispute . . . to require a jury or judge to resolve the
18 parties' differing versions of the truth at trial." *Id.* (quoting *First Nat'l Bank v.*
19 *Cities Serv. Co.*, 391 U.S. 253, 288-89(1968)). The mere existence of a scintilla of
20 evidence is insufficient to establish a genuine issue of material fact. *Anderson v.*
21 *Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

1 The moving party bears the initial burden of demonstrating the absence of a
 2 genuine issue of material fact. *See Celotex*, 477 U.S. at 323 (1986). If the moving
 3 party meets this challenge, the burden then shifts to the non-moving party to “set
 4 out specific facts showing a genuine issue for trial.” *Id.* at 324 (internal quotations
 5 omitted). The nonmoving party “may not rely on denials in the pleadings, but must
 6 produce specific evidence, through affidavits or admissible discovery material, to
 7 show that the dispute exists.” *Bhan v. NME Hosps., Inc.*, 929 F.2d 1404, 1409 (9th
 8 Cir. 1991). In deciding a motion for summary judgment, the court must construe
 9 the evidence and draw all reasonable inferences in the light most favorable to the
 10 nonmoving party. *T.W. Elec. Serv.*, 809 F.2d at 631-32. The Ninth Circuit
 11 recognizes “that summary judgment is singularly inappropriate where credibility is
 12 at issue.” *S.E.C. v. M & A W., Inc.*, 538 F.3d 1043, 1054-55 (9th Cir. 2008)
 13 (*quoting SEC v. Koracorp Indus., Inc.*, 575 F.2d 692, 699 (9th Cir.1978)).

14 ANALYSIS

15 *Qualified Immunity for Individual Officer Defendants*

16 Qualified immunity is “an entitlement not to stand trial or face the other
 17 burdens of litigation.” *Saucier v. Katz*, 533 U.S. 194, 200 (2001) (internal quotes
 18 omitted), *abrogated in part on other grounds by Pearson v. Callahan*, 129 S. Ct.
 19 808, 817-18 (2009). Therefore, qualified immunity questions should be resolved
 20 “at the earliest possible stage in litigation.” *Pearson v. Callahan*, 555 U.S. 223,
 21 232 (2009).

1 When government officials invoke qualified immunity from suit, courts
2 must decide the claim by applying a two-part analysis: (1) whether the conduct of
3 the official, viewed in the light most favorable to plaintiff, violated a constitutional
4 right; and (2) whether the right was clearly established at the time of the alleged
5 violation. *See Pearson*, 555 U.S. at 232-36 (trial court judges should exercise their
6 “sound discretion in deciding which of the two prongs of the qualified immunity
7 analysis should be addressed first in light of the circumstances in the particular
8 case at hand”). Thus, the constitutional violation prong concerns the
9 reasonableness of an official’s mistake of fact, and the clearly established prong
10 concerns the reasonableness of the officer’s mistake of law. *See Torres v City of*
11 *Madera*, 648 F.3d 1119, 1127 (9th Cir. 2011), *cert. denied by Noriega v. Torres*,
12 2012 U.S. LEXIS 215 (U.S., Jan. 9, 2012).

13 ***Whether a constitutional violation occurred***

14 **Eighth Amendment**

15 Plaintiffs allege that Paynter and Audie violated Will’s right to be free from
16 cruel and unusual punishment and the unnecessary and wanton infliction of pain
17 under the Eighth Amendment. ECF No. 37 at 30. However, as Defendants point
18 out, the Eighth Amendment’s prohibition of cruel and unusual punishment “applies
19 only ‘after conviction and sentence.’” *Lee v. City of Los Angeles*, 250 F.3d 668,
20 686 (9th Cir. 2001). Plaintiffs cannot make out an Eighth Amendment violation
21 under their alleged facts which failed to state that Will had been convicted or

1 sentenced. Therefore, Defendants are entitled to summary judgment on any of
2 Plaintiffs' claims based on the Eighth Amendment.

3 Fourth Amendment

4 Before delving into the Fourth Amendment analysis, the Court notes that
5 Fourth Amendment rights, as a general rule, are personal rights that may not be
6 vicariously asserted. In section 1983 actions, however, "the survivors of an
7 individual killed as a result of an officer's excessive use of force may assert a
8 Fourth Amendment claim on that individual's behalf if the relevant state's law
9 authorizes a survival action." *Moreland v. Las Vegas Police Dep't*, 159 F.3d 365,
10 369 (9th Cir. 1998) (citing 42 U.S.C. § 1988(a)). The state's survival law must be
11 followed unless it is "inconsistent with the Constitution and the laws of the United
12 States." 42 U.S.C. § 1988(a).

13 In Washington, "[a]ll causes of action by a person . . . against another person
14 or persons shall survive to the personal representatives of the former . . . , whether
15 such actions arise on contract or otherwise." Wash. Rev. Code 4.20.046(1).
16 Referred to as the "general survival statute, [Wash. Rev. Code] 4.20.046(1),
17 preserves all causes of action that a decedent could have brought if he or she had
18 survived." *Otani ex rel. Shigaki v. Broudy*, 151 Wn.2d 750, 755-56 (Wash. 2004).
19 Therefore, Plaintiffs may pursue a Fourth Amendment violation as Will's personal
20 representatives.

1 An objectively unreasonable use of force violates the Fourth Amendment of
2 the Constitution's prohibition against unreasonable seizures. *Graham v. Connor*,
3 490 U.S. 386, 394-96 (1989). A determination of objective reasonableness
4 requires a "careful balancing" of two competing interests: "the nature and quality
5 of the intrusion on the individual's Fourth Amendment interests" and the
6 government's interests behind the use of force. *Graham*, 490 U.S. at 396. The
7 inquiry takes into account that "police officers are often forced to make split-
8 second judgments—in circumstances that are tense, uncertain, and rapidly
9 evolving—about the amount of force that is necessary in a particular situation."
10 *Graham*, 490 U.S. at 396. Therefore, the inquiry accepts that decisions may be
11 made based on a misperception of the circumstances and using judgment
12 influenced by the adrenaline of the moment. "Not all errors in perception or
13 judgment, however, are reasonable." *Torres*, 648 F.3d at 1123. "While we do not
14 judge the reasonableness of an officer's actions 'with the 20/20 vision of
15 hindsight,' nor does the Constitution forgive an officer's every mistake." *Torres*,
16 648 F.3d at 1123 (*quoting Graham*, 490 U.S. at 397) (internal citations omitted).

17 The government's interest in the force used is measured by the following
18 factors: (1) "the severity of the crime at issue," (2) "whether the suspect poses an
19 immediate threat to the safety of the officers or others," and (3) "whether he is
20 actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S.
21 at 396. The "'most important' factor under *Graham* is whether the suspect posed

1 an ‘immediate threat to the safety of officers or third parties.’” *George v. Morris*,
2 736 F.3d 829, 838 (9th Cir. 2013) (quoting *Bryan v. MacPherson*, 630 F.3d 805,
3 826 (9th Cir. 2010)).

4 In assessing the totality of the circumstances informing an officer’s conduct,
5 the Court also may consider “whatever specific factors may be appropriate in a
6 particular case, whether or not listed in *Graham*.” *Bryan*, 630 F.3d at 826. Other
7 factors include the availability of less intrusive force, *Hughes v. Kisela*, 841 F.3d
8 1081, 1085 (9th Cir. 2016), whether the officer warned the individual prior to
9 using force, *Franklin v. Foxworth*, 31 F.3d 873, 876 (9th Cir. 1994), and whether
10 feasible, less intrusive methods of effecting an arrest were available³, *Bryan*, 630
11 F.3d 805, n. 15. Courts also may examine “whether it should have been apparent
12 to the officer that the subject of the force used was mentally disturbed.” *Hughes*,
13 841 F.3d at 1085 (citing *Bryan*, 630 F.3d at 831; *Deorle v. Rutherford*, 272 F.3d
14 1272, 1282-83 (9th Cir. 2001)).

15 The Ninth Circuit recently clarified and reiterated how the presence of
16 mental illness may affect the balancing that a court must undertake. In *Hughes*,
17 841 F.3d 1081, police responded to a call alerting them that a woman had been

18 ³ The Court notes that law enforcement officers are not required to employ the least
19 intrusive means so long as their actions fall within a range of reasonable conduct.
20 See *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).
21

1 acting erratically and hacked at a tree with a knife. After officers arrived, the
2 woman exited her house carrying a knife. *Id.* at 1084. An officer shot her when
3 when she did not comply with police commands to drop the knife and continued to
4 move toward the person with whom she lived and who had requested police
5 assistance. *Id.*

6 The *Hughes* Court observed that the Ninth Circuit has “‘refused to create
7 two tracks of excessive force analysis, one for the mentally ill and one for serious
8 criminals.’” 841 F.3d at 1086 (*quoting Bryan*, 620 F.3d at 829). However, the
9 court emphasized that the Circuit also had “‘found that even when an emotionally
10 disturbed individual is acting out and inviting officers to use deadly force to
11 subdue him, the governmental interest in using such force is diminished by the fact
12 that the officers are confronted . . . with a mentally ill individual.’” *Hughes*, 841
13 F.3d at 1086 (*quoting Bryan*, 620 F.3d at 829, and omitting internal citation and
14 quotation marks).

15 The Court begins by recognizing that the intrusions on Will’s Fourth
16 Amendment interests were undoubtedly severe. Will began his interaction with
17 Spokane County law enforcement in such a state of agitation and potential delusion
18 that he may not have understood what was happening as the incident progressed.
19 As a result of the interaction, Will lost his life. Nevertheless, for purposes of a
20 qualified immunity analysis, the question of reasonableness is considered not from
21

1 the subject's viewpoint, but from the perspective of a "reasonable officer on the
2 scene." *Graham*, 490 U.S. at 396.

3 Beginning with the "most important" *Graham* factor for analyzing the
4 government's interest, *see George*, 736 F.3d at 838, the Court finds that a rational
5 jury could find that Will did not pose an *immediate* risk of harm to the deputies or
6 the public justifying deadly force. Will was not wearing a shirt and was visibly
7 unarmed, removed himself from a crowded area to a vacant parking lot, and only
8 fought with the deputies after he had been tased multiple times, hit his head on the
9 ground, tased again, and was in the process of arguably being strangled by law
10 enforcement. Before the police arrived, some of the tension and volatility of the
11 situation that began in the gym diffused after Will was successfully escorted
12 outside. Accordingly, although the Court recognizes that Will's behavior posed
13 some threat, the record does not support that the risk of imminent harm by Will
14 justified such a swift and severe invasion of his Fourth Amendment interests. *See*
15 *Deorle*, 272 F.3d at 1281 ("A desire to resolve quickly a potentially dangerous
16 situation is not the type of government interest that, standing alone, justifies the use
17 of force that may cause serious injury").

18 In addition, the severity of the crime was relatively low, consisting of minor
19 property damage and physically threatening behavior while in the gym. Disorderly
20 conduct is a misdemeanor. *See Wash. Rev. Code 9A.84.030*. Even if the deputies
21 assumed that Will had assaulted individuals in the gym, the Ninth Circuit has

1 found in situations involving alleged domestic violence that “the circumstances are
2 not such . . . to warrant the conclusion that [the suspect] was a particularly
3 dangerous criminal or that his offense was especially egregious” and that “the
4 nature of the crime at issue [provided] little, if any, basis for the officers’ use of
5 physical force.” *Smith v. City of Hemet*, 394 F.3d 689, 702-03 (9th Cir. 2005). In
6 short, there are no facts supporting that the deputies reasonably would have
7 thought that Will was a violent felon.

8 As to the remaining relevant factors, it is dubious that Will posed a
9 risk of flight. Although the record indicates that Will was in near constant
10 movement throughout the incident, he had remained in the vicinity of the gym
11 parking lot for approximately twenty minutes before police arrived.

12 With respect to any warnings made to Will by Paynter or Audie, there is no
13 indication that the officers attempted informal contact with Will to assess his
14 condition before they tased him to subdue him and bring him under control.
15 Paynter asserts that he immediately told Will that he was under arrest and to get on
16 the ground immediately. At least one bystander corroborates that Paynter ordered
17 Will to get on the ground and allow the deputy to arrest him. However, the Court
18 could find no corroboration of a warning. Therefore, the question of what
19 statements Paynter made to Will present a credibility determination that should not
20 be resolved through summary judgment. *See Reeves v. Sanderson Plumbing*
21

1 *Prods.*, 530 U.S. 133, 150 (2000) (a court considering a summary judgment motion
2 “may not make credibility determinations or weight the evidence”).

3 Finally, the deputies insisted that they did not view Will as being in a state
4 of excited delirium. However, Plaintiff has put forth sufficient evidence to
5 question whether the deputies’ failure to notice the cues that Will was in the midst
6 of some sort of psychotic break, as well as failure to observe that he was wearing a
7 medical bracelet as noted and reported by several witnesses, was reasonable.

8 In conclusion, a rational jury could find that the factors considered in
9 determining the government's interest in the use of force weigh in Plaintiffs' favor.
10 Relevant credibility determinations and resolution of disputed factual contentions
11 must be reserved for a jury.

12 Fourteenth Amendment

13 The Due Process Clause forbids the State from depriving individuals of life,
14 liberty, or property without “due process of law.” U.S. Const. amend. XIV.

15 In the Complaint, ECF No. 1, Plaintiffs David and Amber bring a
16 substantive due process claim on behalf of Will, as personal representatives of his
17 estate, and on behalf of themselves, as Will’s brother and sister-in-law.

18 The Ninth Circuit has recognized that the Fourteenth Amendment protects a
19 liberty interest for parents “in the companionship and society of their children.”
20 *Wilkinson v. Torres*, 610 F.3d 546, 554 (9th Cir. 2010). However, the Ninth
21 Circuit has declined to recognize such an interest between siblings. *Ward v. City*

1 of *San Jose*, 967 F.2d 280, 284 (9th Cir. 1991). Accordingly, David and Amber's
2 due process claim fails as a matter of law because they did not have a
3 constitutionally protected interest in companionship with Will under section 1983.
4 *See Ward*, 967 F.2d at 284.

5 Plaintiffs' briefing on the instant summary judgment motion is silent as to
6 any Fourteenth Amendment violation against Will. The Court finds that the Fourth
7 Amendment's reasonableness standard alone must address whether a constitutional
8 violation occurred here. "If a constitutional claim is covered by a specific
9 constitutional provision . . . the claim must be analyzed under the standard
10 appropriate to that specific provision, not under the rubric of substantive due
11 process." *County of Sacramento v. Lewis*, 523 U.S. 833, 843 (1998) (*quoting*
12 *United States v. Lanier*, 520 U.S. 259, 272 n.7 (1997); *see also Reed v. Hoy*, 909
13 F.2d 324, 329 (9th Cir. 1990) ("Claims arising before or during arrest are to be
14 analyzed exclusively under the [Fourth Amendment's] reasonableness standard
15 rather than the substantive due process standard . . ."); *accord Fontana v. Haskin*,
16 262 F.3d 871, 881-82 (9th Cir. 2001).

17 ***Whether the right was clearly established***

18 "[T]he relevant, dispositive inquiry in determining whether a right is clearly
19 established is whether it would be clear to a reasonable officer that his conduct was
20 unlawful in the situation he confronted." *Saucier*, 533 U.S. at 202. The court's
21 inquiry "must be undertaken in light of the specific context of the case, not as a

1 broad general proposition.” *Saucier*, 533 U.S. at 201. The incident concerning
2 the Court here occurred on June 6, 2013.

3 Defendants rely on the Supreme Court’s recent decision in *City and Cty. of*
4 *San Francisco v. Sheehan*, 135 S.Ct. 1765 (2015), to make two separate
5 arguments: that any clarification arising out of *Sheehan* regarding whether the
6 Defendant deputies’ conduct violated a right that was clearly established should
7 not be weighed in Plaintiff’s favor because *Sheehan* was decided after the 2013
8 events at issue here; and, second, that *Sheehan* is almost directly on point and
9 shows that the Defendant deputies are entitled to qualified immunity from this suit.
10 Defendants read *Sheehan* to support their qualified immunity defense that there
11 was, and is, no clearly established right for law enforcement officials to
12 accommodate one’s mental illness, and the Court agrees with that reading of
13 *Sheehan*’s holding. *See* 135 S.Ct. at 1778.

14 However, Plaintiffs’ complaint and the briefing does not have to be so
15 narrowly construed regarding the right that Plaintiffs assert was violated. Instead,
16 the question of whether Defendants should have recognized that Will was in the
17 midst of a mental health crisis is one of a set of related questions going toward the
18 central issue of whether these deputies’ behavior was objectively reasonable, and
19 whether their use of force was excessive, given the totality of the circumstances
20 facing them at the time. *See Graham*, 490 U.S. at 397. Notably, the officers’ use
21 of force was not in issue in the Supreme Court’s decision in *Sheehan*. *See* 135

1 S.Ct. at 1775 (“We also agree with the Ninth Circuit that after the officers opened
2 Sheehan’s door the second time, their use of force was reasonable”). The issue in
3 *Sheehan* was limited to whether the officers’ failure to accommodate plaintiff’s
4 mental illness rendered otherwise constitutional actions by the officers
5 unconstitutional. *See Sheehan*, 135 S.Ct. at 1775. That is not the situation in the
6 present matter.

7 Moreover, *Sheehan* is distinguishable on facts that go toward whether the
8 right that was violated was clearly established at the time of the incident. The
9 plaintiff in *Sheehan* was holding a knife, had made specific threats against her
10 social worker, threatened to kill the officers, and forced the officers to retreat from
11 the confined space of her room into the hallway, another confined space compared
12 to the setting at issue here. The officers in *Sheehan* first used pepper spray to try to
13 deter the plaintiff in that matter, and deployed potentially deadly force by shooting
14 the plaintiff, who survived, after the plaintiff continued to charge with a knife at an
15 officer who was cornered. By contrast, the facts at issue here present a credibility
16 issue as to whether sufficient warnings were issued, or whether any other attempt
17 at communication was made, before Will was tased.

18 Additionally, it is undisputed that Will had no weapon, and could not have
19 easily concealed a weapon, because he was wearing only basketball shorts and
20 sneakers. It also is undisputed that the deputies’ encounter with Will occurred
21 primarily in a large, empty parking lot, near vacant buildings, before it was dark,

1 thereby minimizing any possible risk to others. Moreover, there is a question of
2 fact as to how the deputies physically restrained Will after he was tased a second,
3 third, and fourth time, while he was face down on the ground, which then goes to
4 the legal question of whether that force was constitutionally justifiable.

5 In sum, Plaintiffs' argument that the deputies deployed excessive force
6 against Will is not entirely dependent on Will's mental illness, nor is the main
7 issue presented whether deputies should have known that they were
8 constitutionally required to accommodate that mental illness. Rather, well-settled
9 authority in place before June 6, 2013, established that an officer may not
10 reasonably deploy lethal force to apprehend a suspect where the suspect posed no
11 immediate threat to the officer or others. *See Wilkinson*, 610 F.3d at 550. As
12 discussed above, particularly given the counterfactual scenarios offered by the
13 events of June 4 at the jiu-jitsu gym and by the nonviolent removal of Will from
14 Oz Fitness by customers and staff earlier in the evening, a question of fact persists
15 as to whether Audie and Paynter's intrusion on Will's Fourth Amendment interests
16 was justified.

17 ***Municipal Liability***

18 Municipalities cannot be held liable under section 1983 under a *respondeat*
19 *superior* theory. *Monell v. Department of Social Servs.*, 426 U.S. 658 (1977).
20 Rather, a municipal entity may be liable if it had an official policy or longstanding
21 practice or custom that caused an injury to be inflicted on the plaintiff. *Monell v.*

1 *Department of Social Servs.*, 426 U.S. 658, 694 (1977); *see also Hunter v. County*
2 *of Sacramento*, 652 F.3d 1225, 1236 (9th Cir. 2011) (municipal liability may be
3 shown through “evidence of repeated constitutional violations which went
4 uninvestigated and for which the errant municipal officers went unpunished”).
5 Alternatively, a municipality may be held liable for failing to adequately supervise
6 the employees in question or for ratifying, after-the-fact, their actions. *Gillette v.*
7 *Delmore*, 979 F.2d 1342, 1346-47 (9th Cir. 1992) (ratification occurs when “an
8 official with final policy-making authority ratified a subordinate’s unconstitutional
9 decision or action and the basis for it”). Finally, municipal liability may be based
10 on a failure to train, so long as the plaintiff is able to show that “(1) he was
11 deprived of a constitutional right, (2) the [governmental entity] had a training
12 policy that amounts to deliberate indifference to the [constitutional] rights of the
13 persons with whom [its officers] are likely to come into contact, and (3) his
14 constitutional injury would have been avoided had the [entity] properly trained
15 those officers.” *Blankenhorn*, 485 F.3d at 484 (internal quotations omitted).

16 Plaintiffs have not fleshed out through their opposition to Defendants’
17 summary judgment motion any basis for *Monell* liability. The only support for
18 ratification of the individual Defendants’ actions that the Court finds in the record
19 is the bare assertion of the Spokane County sergeant responsible for reviewing uses
20 of force and overseeing training on defensive tactics, Mr. Gere, that he and the
21 County’s Deadly Force Review Board reviewed the events leading up to Mr.

1 Berger's death. Nor is there any support in the record that Spokane County
2 maintains an unconstitutional custom, policy, or practice that caused Plaintiffs'
3 injury. Finding a lack of support for their claim, the Court grants summary
4 judgment on Plaintiffs' *Monell* claims.

5 ***Liability for Sheriff Knezovich in his individual capacity***

6 Plaintiffs allege claims against Sheriff Knezovich in his official and
7 individual capacity. An "official capacity" claim against a government officer is
8 equivalent to a suit against the governmental entity itself. *See Larez v. City of Los*
9 *Angeles*, 946 F.2d 630, 646 (9th Cir. 1991). Therefore, Plaintiffs' "official
10 capacity" claims against Knezovich depend upon the same theory of liability as
11 their claims against the County and unnecessarily duplicate those claims. *Soffer v.*
12 *Costa Mesa*, 798 F.2d 361, 363 (9th Cir. 1986) ("After [*Monell*, 436 U.S. at 690] . .
13 . suit may be brought directly against a local governmental unit, rendering suit
14 against the individuals unnecessary unless they are sued in their personal
15 capacity").

16 As to claims against Knezovich in his personal capacity, the parties agree
17 that Spokane County Sheriff Ozzie Knezovich was not on site during the June 6,
18 2013, incident involving Mr. Berger. A police chief or sheriff cannot be sued for
19 vicarious liability for a constitutional violation committed by his subordinate(s)
20 just as a municipality cannot be liable under section 1983 by way of *respondeat*
21 *superior*. *Blankenhorn v. City of Orange*, 485 F.3d 463, 485 (9th Cir. 2007). A

1 police chief, and thus a sheriff, may be held individually liable as a supervisor
2 under section 1983: (1) for his own culpable action or inaction in the training,
3 supervision, or control of his subordinates; (2) for his acquiescence in the
4 constitutional deprivation of which the complaint is made; or (3) for conduct that
5 showed a reckless or callous indifference to the rights of others. *Blankenhorn*, 485
6 F.3d at 485 (internal citations and quotations omitted); *see also Watkins v. City of*
7 *Oakland*, 145 F.3d 1087, 1093 (9th Cir. 1998). If Paynter and Audie used
8 excessive force, Knezovich may be liable if he either “set in motion a series of acts
9 by others, or knowingly refused to terminate a series of acts by others, which he
10 knew or reasonably should have known, would cause others to inflict the
11 constitutional injury.” *Watkins v. City of Oakland*, 145 F.3d 1087, 1093 (9th Cir.
12 1998) (quoting *Larez v. City of Los Angeles*, 946 F.2d 630) (internal quotations
13 omitted).

14 As found above, Plaintiffs do not raise a genuine issue of material fact as to
15 whether any policy or lack of training was a moving force behind a constitutional
16 violation at issue in this case. Likewise, the Court does not find a genuine issue of
17 material fact as to whether Knezovich is liable in his individual capacity. Just as
18 Plaintiffs’ factual allegations were insufficient to find either a plausible causal link
19 between the policies and customs of Spokane County, there is also a lack of a
20 plausible theory, sufficient facts, or evidence in the summary judgment record to
21

1 connect the supervisory actions of Knezovich to the deputies' alleged use of force
2 against Will.

3 ***Negligence***

4 The elements of a negligence claim include duty, breach, causation, and
5 injury. *Keller v. City of Spokane*, 146 Wn.2d 237, 242 (Wash. 2002). The parties
6 agree that a separate claim of negligence does not inherently conflict with
7 Plaintiffs' section 1983 excessive force claim. However, Defendants argue that
8 Plaintiffs cannot avoid summary judgment on the negligence claim by setting forth
9 "the same argument relied upon in the excessive force claim." ECF No. 66 at 19.

10 To the extent that Plaintiffs' negligence claim rehashes their *Monell* claims
11 against the County and the personal claim against Sheriff Knezovich, which the
12 Court determined are unsupported by the evidence, the Court agrees with
13 Defendants. However, the Court finds that there is sufficient evidence in the
14 record for a factfinder to consider whether, if it is determined that Defendants
15 Audie and Paynter's actions did not amount to excessive force their attempts to
16 subdue Will amounted to a lack of care. *See Carector v. City of Yakima*, No. 2:14-
17 cv-03004-SAB, 2015 U.S. Dist. LEXIS 57961 (E.D. Wash. Apr. 27, 2015)
18 (reaching the same result and reasoning, "A jury could find that either [the
19 Defendant] should have subdued her differently to avoid her head injury or should
20 have done something earlier to prevent the plaintiff from acting up). Accordingly,

1 Plaintiffs' negligence claims against Audie, Paynter, and the County, under
2 *respondeat superior*, may move forward.

3 ***John Doe Defendants***

4 This District's General Orders 84-37 and 13-37-1, read together, require the
5 Court to review a complaint naming "Doe" Defendants to determine whether they
6 shall remain as named parties. Plaintiffs named ten "John Doe" Defendants in
7 their complaint, yet have failed to identify any of the John Does or offer any
8 evidence to support any claims against John Does. Therefore, the Plaintiffs'
9 claims against any Doe Defendants shall be dismissed.

10 Accordingly, **IT IS HEREBY ORDERED** that Defendants' motion for
11 summary judgment, **ECF No. 24**, is **granted in part** and **denied in part** as
12 follows:

- 13 1. Plaintiffs' section 1983 Fourth Amendment excessive force claims
14 against Deputies Audie and Paynter shall proceed to trial;
- 15 2. Plaintiffs' negligence claims against Deputies Audie and Paynter, and
16 *respondeat superior* claim against the County, shall proceed to trial;
- 17 3. Plaintiffs' Fourteenth Amendment due process claims are dismissed;
- 18 4. Plaintiffs' Eighth Amendment claims are dismissed;
- 19 5. Plaintiffs' *Monell* liability claims against the County and Sheriff
20 Knezovich are dismissed; and

6. All claims against Sheriff Knezovich in his personal capacity are dismissed.

7. Plaintiffs' claims against all Doe Defendants are dismissed

The District Court Clerk is directed to enter this Order, enter Judgment accordingly, and provide copies to counsel.

DATED February 13, 2017.

s/ Rosanna Malouf Peterson
 ROSANNA MALOUF PETERSON
 United States District Judge